SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1970

No. [redacted] 149

ROBERT LAWRENCE DILLON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INDEX

1. Opinion of the Court Below 2
2. Statutory Provision Sustaining Jurisdiction 2
3. Questions Presented and How Raised 3
4. Statutes and Regulations Involved 3
5. Statement of the Case 3
6. The Facts 3
7. Argument—

I. Tension Between Act and Agency Regulation 6

II. Some Draft Cases Already Support the View That *This* Act Must Take Precedence Over § 1625.2 12

III. Petitioner Was Deprived of Due Process 13

Conclusion 15

Appendix A—Opinion, United States Court of Appeals, Ninth Circuit A1

Appendix B—Judgment A5

Appendix C—Order Denying Petition for Rehearing A5

Appendix D—Pertinent Constitutional Amendments, Statutes and Regulations A6

Table of Cases

Briggs v. *U. S.*, 397 F.2d 370 (1968) 15

Chernekoff v. *U. S.*, 9 Cir., 1955, 219 F.2d 721 14

Dixon v. *U. S.*, 281 U.S. 68, 85 S.Ct. 1301, 14 L.Ed.2d 223 (1965) 7, 10

Ehlert v. *U. S.*, 9 Cir., 1970, ... F.2d ....., 2 SSLR 3495 ..... 9, 10

Field v. *Clark*, 143 U.S. 649, 12 S.Ct. 495, 36 L.Ed. 294 (1892) 7

Koshland v. *Helvering*, 298 U.S. 441, 56 S.Ct. 767, 80 L.Ed. 1268, 105 A.L.R. 756 (1936) 7

Manhattan General Equipment Co. v. *Commissioner of Internal Revenue*, 297 U.S. 129, 56 S.Ct. 397, 80 L.Ed. 528 (1936) 10

Seeger v. *U. S.*, 380 U.S. 163 (1965) 9

Sexton v. *Barry*, 223 F.2d 220, cert. den. 352 U.S. 870, 77 S.Ct. 94, 1 L.Ed.2d 76 13

Sunshine Anthracite Coal Co. v. *Adkins*, 310 U.S. 381, 60 S.Ct. 907, 84 L.Ed. 1263 (1940) 7

U. S. v. *Burlich*, D.N.Y., 1966, 257 F. Supp. 906 15

U. S. v. *Clark*, W.D. Pa., 1952, 105 F. Supp. 613 12-13

U. S. v. *Derstine*, 129 F. Supp. 117, E.D. Pa. 1954 14

U. S. v. *Grimaud*, 220 U.S. 506, 31 S.Ct. 480, 55 L.Ed. 563 (1911) 7

U. S. v. *Kuwabara*, 56 F. Supp. 716 13

U. S. v. *Parcels of Land in Prince George's County, Md.*, 40 F. Supp. 436 13

U. S. v. *Shreveport Grain & Elevator Co.*, 287 U.S. 77, 53 S.Ct. 42, 77 L.Ed. 175 (1932) 6

U. S. v. *Wheeler*, 149 F. Supp. 445 14

Youngstown Co. v. *Sawyer*, 343 U.S. 579 (1952) 11

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

32 C.F.R. 1625.2 .....2, 3, 9, 12

32 C.F.R. 1628.10 3

Constitution of the United States—

First Amendment 3

Fourth Amendment 14

Fifth Amendment 3, 13, 14

Selective Service Amendment Act of 1969 (P.L. 91-124) 11

Universal Military Training and Service Act (50 U.S.C. App.)—

Section 10 (b) 1 8
Section 456 (j) 3, 6

OTHER AUTHORITIES

AR-601-270, Ch. 3, ¶69 3
Davis, Administrative Law Treatise, Vol. 1, Section 5:09 11
Department of Defense Directive No. 1300.6 8

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. _____

ROBERT LAWRENCE DILLON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Supreme Court of the United States:

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming the judgment of the United States District Court for the Central District of California, convicting the petitioner for a violation of the Universal Military Training and Service Act and sentencing him to the custody of the Attorney General.

1. OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals is not yet reported. It is set forth as Appendix A to this petition.

2. STATUTORY PROVISION SUSTAINING JURISDICTION

The judgment of the Court of Appeals was entered on April 13, 1970. See Appendix B to this petition.*

This Petition for Writ of Certiorari is filed within the required thirty days time, as extended by Mr. Justice Douglas to .....,** 1970.

The jurisdiction of the Court rests on Section 1254 (1) of the Judicial Code, 28 U.S.C. The District Court had jurisdiction under 18 U.S.C. § 3231.

3. QUESTIONS PRESENTED AND HOW RAISED

The constitutional questions raised by petitioner involve both the First and the Fifth Amendments.

First Amendment: Is conscientious objection something under a young man's control and therefore an exception contemplated by the administrative agency regulation, 32 C.F.R. §1625.2, that makes the issuance of an Order to Report for Induction the deadline for new information excepting only that of a status arising beyond his control?

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*This petitioner's Petition for Rehearing was denied by the Court of Appeals on April 13, 1970. See Appendix C to this Petition.

**Petitioner did not wait for a ruling on the request for the extension of time but printed and filed this petition in the original time.

Fifth Amendment: Two problems arise here: (1) May a conclusion be reached by a fact finding without the presence of any factual basis? (2) May an administrative agency's regulation contravene the intent of Congress?

The questions were raised in the trial court by a written motion for judgment of acquittal and briefed in the Court of Appeals.

4. STATUTES AND REGULATIONS INVOLVED

Involved are the Fifth Amendment, the First Amendment and § 456 (j), of the Universal Military Training and Service Act of 1951, as amended (50 U.S.C.A. App.) and 32 C.F.R. § 1625.2. Also AR-601-270, Ch. 3, ¶69; 32 C.F.R. § 1628.10. They are set forth in Appendix D.

5. STATEMENT OF THE CASE

The indictment charged Dillon with a violation of the Universal Military Training and Service Act for refusing to submit to induction [CT. 2].

Dillon pleaded "not guilty" and was tried by the Honorable Charles H. Carr, District Judge, sitting alone without a jury. He was found guilty and sentenced.

6. THE FACTS

The relevant facts in this appeal are found in (1) the petitioner's Selective Service file [Ex.]* and in (2) the reporter's transcript of proceedings of the trial [RT.]** both being parts of the designated record on appeal.

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*Ex. refers to the government Exhibits 1 and 2, the complete SS file of Appellant.

**RT. refers to the Reporter's Transcript of Proceedings of the trial.

Petitioner Robert Lawrence Dillon registered with the Selective Service System on November 25, 1964. He filled out his original Classification Questionnaire and it was returned to the Local Board on December 30, 1964 [Ex. 1].

On November 14, 1965 Petitioner was classified 1-A [Ex. 11]. On March 29, 1966 SSS Form 150 for Conscientious Objectors was mailed to Petitioner and returned by him to the Local Board on April 15, 1966. On May 10, 1966 Petitioner was classified 1-A. The Local Board mailed notification to Petitioner on May 12, 1966. The Petitioner wrote about the 1-A classification and was given a personal appearance before the Local Board, on June 20, 1966. Petitioner was notified of re classification into class 1-A-O.

The Petitioner had previously been found acceptable for military service and on July 18, 1966 was mailed an order to report for induction into the armed services with a reporting date of August 17, 1966. The Petitioner reported but refused to submit to induction.

On August 24, 1966 Petitioner wrote to General Lewis B. Hershey the following letter:

Aug. 24, 1966
1382 Euclid Ave.
Berkeley, 8, Calif.

Lt. Gen. Lewis B. Hershey
Director, Selective Service System
1724 F Street, N.W.
Washington, D. C. 20435

Dear Sir:

I am Writing a final appeal to ask that my Induction Order be cancelled and my classification be reopened. In the past, as you know from my file, I have written my local board and the State Director in an effort to convince them of my genuine beliefs of conscientious objection, and gain a "I-O" classi-

fication. However, these appeals were useless as neither found any information for what they felt warranted an investigation. Subsequently, I refused Induction; due to the lack of time, it was the only step left me with which to try to gain a just decision of my case.

I am now appealing to you, not on the grounds that my board has committed some procedural error, but that my beliefs are real and genuine, and I wish a just termination of my case. I know that the situation caused by my appeal coming after my draft notice, and my refusal of Induction makes this difficult to understand or believe. Nevertheless, I have come to realize that any participation in the military service condones killing and butchery and helps perpetuate it. I cannot condone war or military police action in any form, or participate in the making of men into machines, and live with my conscientious. Looking over my file will obviously give you a much more detailed account of my values and how they came into being.

I want to state that I, myself, know that I have done nothing wrong. I have simply defended my beliefs and my integrity. And as I have said numerous times before, I am willing and eager to work in a civilian capacity, as long as the work is not connected with the military. I hope that I will be given a chance to do some constructive service for my country, and not waste time and my energies in the court proceedings that must follow.

Yours Truly,

/s/ Robert L. Dillon
4-46-46-305 [Ex. 66]

On December 13, 1966, the situation was considered by the Local Board and the Petitioner was notified that in its opinion the facts did not warrant a reopening of the SSS File or a reclassification. The Petitioner was ordered to report for induction on January 25, 1967. He did do so but refused induction.

7. ARGUMENT

I

Tension Between Act and Agency Regulation

Congress explicitly established conscientious objection and nowhere, even by implication, set a deadline for its presentation.

Petitioner refers to the dilemma involved in a confrontation between an Act of Congress and an agency regulation.

Congress by law clearly intended to expeditiously raise an army. But it is the will of Congress, by unequivocal expression in the law, that conscientious objectors should be exempt.

Congress declared in Section 456 (j) of the Universal Military Training and Service Act, 50 U.S.C. App., that:

> "Nothing contained in this Title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States, who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."

It is true, as an early Supreme Court decision puts it, "Congress may declare its will, and after fixing a primary standard, devolve upon administrative officers the 'power to fill up the details' by prescribing administrative rules and regulations." *United States* v. *Shreveport Grain & Elevator Co.*, 287 U.S. 77, 85, 53 S.Ct. 42, 44, 77 L.Ed. 175 (1932).

Yet one of the settled portions of constitutional law is that the power conferred upon the legislature to make laws cannot be delegated by that branch of government to any

other body or authority. As the Supreme Court stated it: "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Field* v. *Clark*, 143 U.S. 649, 692, 12 S.Ct. 495, 504, 36 L.Ed. 294 (1892).

But the President may prescribe administrative rules upon Congressional authorization. *United States* v. *Grimaud*, 220 U.S. 506, 521, 31 S.Ct. 480, 484, 55 L.Ed. 563 (1911). It is true in modern times that this doctrine has been widening, for as Mr. Justice Douglas declared, with only Mr. Justice McReynolds dissenting: "Delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility." *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 398, 60 S.Ct. 907, 914, 84 L.Ed. 1263 (1940).

Yet despite the widening, it is still a clear principle of constitutional law that the President may not legislate contrary to Congressional law.

As the Supreme Court declared in *Koshland* v. *Helvering*, 56 S.Ct. 767, 298 U.S. 441, 80 L.Ed. 1268, 105 A.L.R. 756 (1936): "Where provisions of a statute are unambiguous and its directions specific, the statute cannot be amended by regulation." For, as the Court pointed out, "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law, but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute." *Dixon* v. *United States*, 85 S.Ct. 1301, 381 U.S. 68, 14 L.Ed.2d 223 (1965). Speaking for the Court at 1304, Mr. Justice Brennan then went on to declare: "A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity."

Pursuant to the delegated powers in the Act, regulations were adopted for administrative procedures. 10 (b) 1 of the Act provides: "The President is authorized—to prescribe the necessary rules and regulations to carry out the provisions of this title."

The regulations, promulgated by the President, provide procedures for determining the merit of claims for deferment. Those procedures provide that the registrant may ask for a face to face confrontation with the local board and, if it rejects his claim for a review of his file by the State Appeal Board. A short cut, one that does not offer him either, or both, of these avenues of relief is unlawful.

It is submitted that the provision of the Act concerning conscientious objectors is unambiguous and its direction specific.

A pertinent restatement of it is found in the Department of Defense directive to all the eleven armed services:

> ". . . the Congress, as indicated by provisions of P.L. 90-40 (reference (c)) and related statutes, has deemed it more essential to respect a man's religious beliefs than to force him to serve in the Armed Forces. . ." [DoD Directive No. 1300.6].

It is clear that Congress put no time limit on the presentation of such a claim. Any administrative inconvenience that results from "late" filing is to be remedied by Congress, not by the agency. Every agency, and this one, certainly has administrative inconveniences and frustrations. There is no legal excuse for short cuts to avoid them, in the face of Congressional intent.

Neither the President nor his representative can nullify the will of Congress by prescribing regulations which

are contrary to the intent of the statute enacted by Congress.

In regards to conscientious objectors, it is submitted that 32 C.F.R. § 1625.2 is contrary to Congressional will as enacted into law and hence null and void.

Congressional policy against requiring combatant training and service of those conscientiously opposed to participation in war is one of long standing. *Seeger* v. *United States,* 380 U.S. 163 (1965). It finds its counterpart in the policy of the armed forces that conscientious objectors should be discharged from service or assigned noncombatant duty.

The majority opinion in the "controlling" case, *Ehlert* v. *United States,* 9 Cir., 1970, ... F.2d ....., 2 SSLR 3495, recognizes that many of the Courts of Appeals differ on this point and states:

> "Whether the crystallization of a conscientious objection to war can constitute a circumstance over which the registrant has no control is a question upon which the circuits have disagreed. Upon the affirmative side, among others, are *United States* v. *Sandbank,* 403 F.2d 38 (2d Cir. 1968), *cert. denied* 394 U.S. 961 (1969); *United States* v. *Gearey,* 368 F.2d 144 (2d Cir. 1966), *cert. denied* 389 U.S. 959 (1967), *rehearing denied* 389 U.S. 1010 (1967), and *Keene* v. *United States,* 266 F.2d 378 (10th Cir. 1959)."

The minority opinion in *Ehlert,* Judge Merrill speaking, with the four other dissenting circuit judges concluded that "I would hold the regulation to be contrary to statute and invalid." The majority had held that a change in a registrant's status (after he had received an induction order) to that of a conscientious objector was a situation over which registrant had control, *but it did not concern itself at all* with the point we advance.

As Judge Merrill stated in *Ehlert*:

> "Legislation creating this exemption from military service, 50 U.S.C. App. § 456 (j) provides for no such limitation. The enforcement of orderly procedures may well require default to be imposed for failure of a registrant to claim in timely fashion. But here the limitation is not based on procedural default. It acts upon the substance of the status itself, and serves to diminish what Congress has bestowed. I regard it as beyond the rule-making power of the System so to exclude from application of the exemption anyone who by virtue of his status is entitled to it under law; or, for reasons of expediency, to relieve itself from the onus of its clear obligation to entertain timely claims of status on the part of registrants not yet inducted into military service."

Concerning conscientious objection, it is clear that the Congressional statute states and defines the rights of the registrant and fixes a standard by which such rights are to be measured.

The regulations constitute a step in the administrative process, but they cannot alter the Congressional will as expressed by statute. *Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue*, 297 U.S. 129, 56 S.Ct. 397, 80 L.Ed. 528 (1936); *Dixon* v. *United States*, 85 S.Ct. 1301, 381 U.S. 68, 14 L.Ed.2d 223 (1965).

The President himself recognizes the authority of Congress in this regard. For example, under the Military Selective Service Act of 1967, the President realized he had not been given power to institute a random selection system to draft registrants into the armed services. Possibly because such a matter involved *all* registrants (and conscientious objection only a few). In any event the President requested Congress to change the law. The President recognized that the wise and legal course was not to change

the law by new regulations. Congress passed the Selective Service Amendment Act of 1969 (P.L. 91-124) and the President signed it on November 26, 1969.

Another example to prove the point was the seizure of the steel mills of the country by President Truman on April 8, 1952, in a labor dispute. In that situation the Supreme Court held that the President could not act contrary to Congressional will. The President had no power to seize the mills without Congressional authorization. When Congress passed the Taft-Hartley Act in 1947, Congress refused to authorize governmental seizures of property as a method of preventing work stoppages and settling labor disputes. The power that the President exercised was lawmaking power, which the Constitution vests in the Congress alone. It is the function of the President to take care that the laws be faithfully executed, not act contrary to Congressional will as expressed by law.* *Youngstown Co.* v. *Sawyer*, 343 U.S. 579 (1952).

In regards to exemption of conscientious objection, the will of Congress is clear. It is stated by a clear, definite, unambiguous statute.

We have the same situation in this draft case.

Once the will of Congress is expressed by law, the President can implement that will by rules and regulations. He cannot, by regulation, legislate contrary to that will.

It may be true, as Professor Kenneth Davis has pointed out (*Administrative Law Treatise*, Volume 1, Section 5:09), that at certain times ascertainment of the intention of Congress in regards to a statute may be impossible. But such is not the case here.

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*Mr. Justice Frankfurter stated at page 602: "Congress has expressed its will to withhold this power [of seizure] from the President *as though it had said so* in so many words." [Italics supplied].

In regards to conscientious objectors the language of the law is clear. The President by regulation cannot change substantially what Congress has willed by law. In regards to conscientious objector registrants 32 C.F.R. § 1625.2 is contrary to the statute and hence invalid.

II

Some Draft Cases Already Support the View That This Act Must Take Precedence Over § 1625.2

There is no need to recite *Gearey* or similar opinions for they are listed in the majority's slip opinion, on page two.

One not listed gives the rationale well:

The facts are on January 29, 1951, defendant mailed to the board a request for appeal from their ruling on his claim. This notice was received by the board on February 3, 1951. Prior thereto, on February 2, 1951, the board mailed a notice to the defendant to report for induction [p. 614].

The opinion says:

> "Although the regulations, literally construed, tend to support this position, we think that a right of appeal does exist in this case. An Act of Congress creates that right without any express limitation, and it seems unreasonable to hold that Congress intended the right of appeal to exist only where the claim for exemption as a conscientious objector was considered at the time of the initial classification. This would be the result in effect if we accept the Government's contention. The right of appeal would exist only in cases where the claim is considered at the time of the initial classification; in all other instances the local board would be able to determine whether a claimant should have an appeal merely by framing its order as a refusal to reopen the original classification rather than an

order granting a reopening of the classification on which a hearing would be held and the right of appeal from an adverse determination granted." *United States* v. *Clark*, W.D.Pa., 1952, 105 F. Supp. 613, 615.

III

Petitioner Was Deprived of Due Process

Petitioner Dillon's prima facie claim for a I-O conscientious objector classification was illegally short circuited in that he was deprived of an appearance before his Local Board concerning his I-O claim and the necessary Administrative Appeal. This arbitrary denial of the reopening of his classification, and the refusal to change his classification from I-A-O to I-O, was unjust and prejudicial to the Petitioner.

In the instant matter before the Court the Local Board and the Selective Service System deprived Dillon of due process of law.

" 'Due process' is a procedure which hears before it condemns, proceeds upon inquiry, and renders judgment only after trial [or fair hearing]". *Sexton* v. *Barry*, 223 F.2d 220, certiorari denied 77 S.Ct. 94, 352 U.S. 870, 1 L.Ed.2d 76. Constitutional guaranty of "due process of law" requires observance of those general rules established in our system of jurisprudence for the security of private rights in any proceeding which may result in depriving a person of life, liberty or property. U.S.C.A., Const. Amend. 5; *U. S.* v. *Kuwabara*, 56 F. Supp. 716. The absolute fundamentals of "due process of law" are jurisdiction, adequate notice, and a fair hearing. U.S.C.A., Const. Amend. 5; *U. S.* v. *Parcels of Land in Prince George's County, Md.*, 40 F. Supp. 436. In regard to "due process," it should be pointed out that the constitutional provision for security of person and property should be

liberally construed. U.S.C.A., Const. Amends. 4, 5; *U. S.* v. *Wheeler*, 149 F. Supp. 445.

With the above in mind and a reading of Dillon's SSS File and the Court proceedings, it is contended that he was deprived of due process of law.

"It is important that a registrant be given an opportunity to appear in person before a Local Board." *U. S.* v. *Derstine*, 129 F. Supp. 117, 121 E.D. Pa. 1954. The Board was correct in granting a personal appearance for the I-A-O claim. The Board should have granted him a personal appearance for the I-O claim also. If the Board had so acted he would have had the opportunity to answer or explain their objections to his I-O conscientious objector classification at the interview. This is one of the purposes of a personal appearance. In *Chernekoff* v. *United States*, (9th Cir., 1955) 219 F.2d 721, 723, the court stated:

> "The fair hearing essential to meet minimum requirements of any accepted notion of due process includes the opportunity to know the adverse evidence and to be heard concerning the truth, relevancy, and significance. Otherwise such a hearing is in violation of the 'concept of ordered liberty.' "

In Dillon's case the Board did not even grant a hearing.

The Local Board simply refused to reopen the case. There should be no question that the action of the Local Board deprived Petitioner of very substantial rights. Had a reopening been granted (and Dillon was entitled to said reopening), even if the Local Board had classified him I-A, he would have been entitled to an administrative appeal from the denial of his conscientious objector I-O claim.

By refusing to reopen the Local Board deprived Dillon of his right to an administrative appeal, and hence of due

process, in consequences of which the order for his induction was invalid. *United States v. Burlich,* 1966, D.N.Y. 257 F. Supp. 906.

A denial of due process occurred also when Dillon's school, University of California, Santa Barbara, sent in the form [Ex. 72, 72A] showing that he was a student regularly attending, taking the full course required, and no attention whatever was paid to that [RT. 10].

A further denial of due process took place January 25, 1967.

Dillon was not given a physical inspection at the time he refused induction on January 25, 1967 [RT. 29, 51].

He never refused to submit to a physical examination or a physical inspection.

Thus because of this failure to give Dillon a physical inspection his conviction should not stand. This Court so stated in *Briggs* v. *United States,* 397 F. 2d 370 (1968) at 374.

CONCLUSION

For the above given reasons certiorari should be granted and the judgment should be reversed.

Respectfully,

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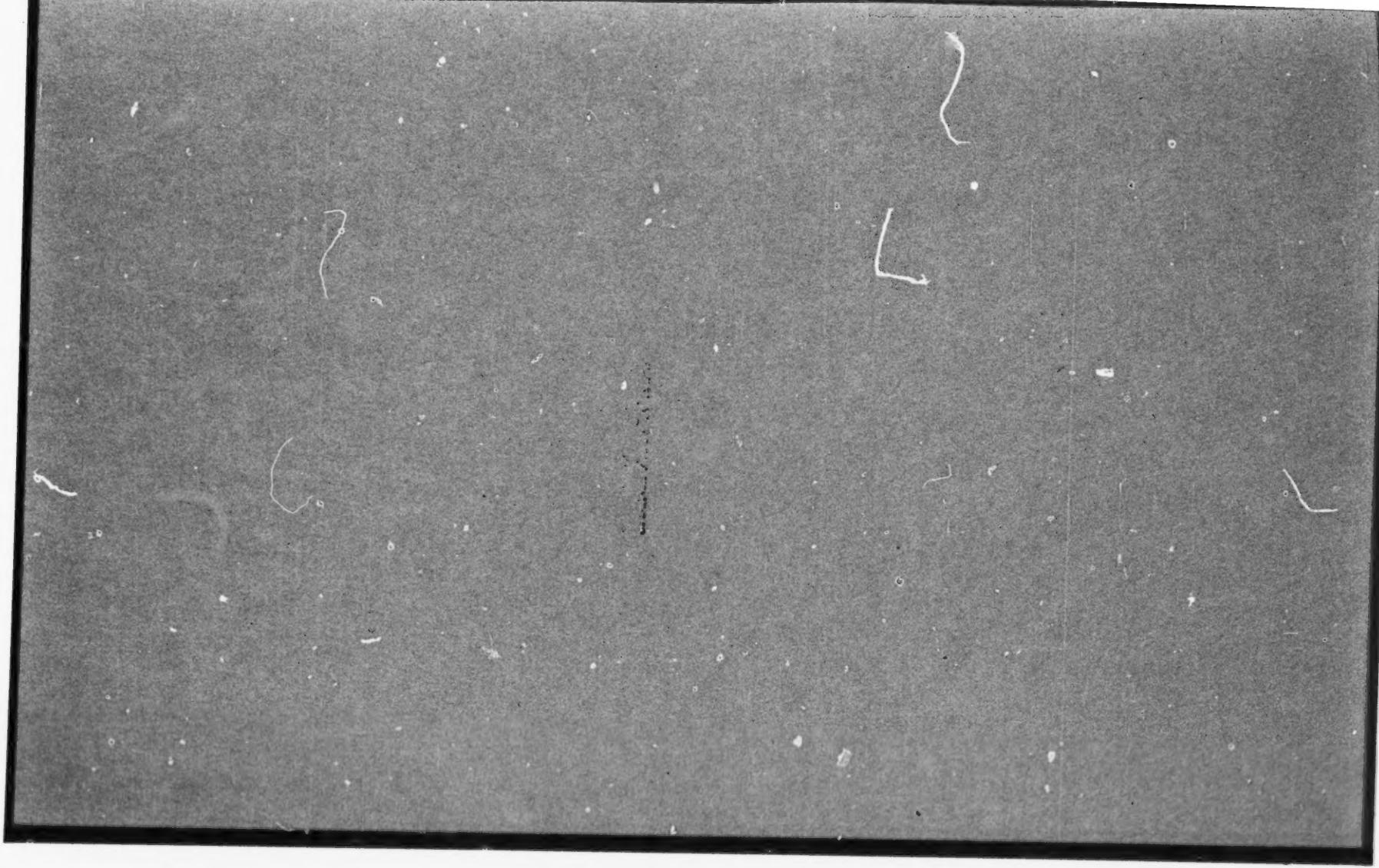
Los Angeles, California 90012
Attorney for Petitioner

May 9, 1970



APPENDIX A

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROBERT LAWRENCE DILLON,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

No. 24,440

[March 13, 1970]

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Before: MADDEN*, Judge, United States Court of Claims, KOELSCH and KILKENNY, Circuit Judges.

KILKENNY, Circuit Judge:

Appellant was indicted, tried and convicted in a non-jury trial for willful refusal to submit to induction into the Armed Forces of the United States in violation of Title 50, U.S.C. App. §462 (a). His sentence of 18 months was suspended on condition that he obtain work of national importance and pay a fine.

Appellant registered with the Selective Service System on November 25, 1964, shortly after his 18th birthday. Originally granted a student deferment, he was ultimately classified in 1-A-O,[1] following the filing of Form 150 in which he specifically requested that status. In March, 1966 he received a pre-induction physical examina-

*The Honorable J. Warren Madden, sitting by designation.

1. Exempt from combatant training only.

tion, was found fully qualified for service and, being no longer entitled to student deferment, was ordered to report for induction on August 17th of the same year. On August 4th, he directed a letter to the Board and requested that his induction order be cancelled and that he be considered for 1-O classification.[2] There, he stated that his thinking, in recent months, with respect to participation in war had changed. He also stated that through lack of advice and counsel at the time of filing the original Form 150, he neglected to apply for a 1-O classification, rather than 1-A-O. He claimed ignorance of the existing classifications. His file was reviewed by the Local Board and, on the record presented, the Board found nothing to sustain a finding that applicant had undergone a change in his status resulting from circumstances beyond his control.[3] His classification was not reopened and he was directed to report in accordance with the previous order. He complied with the order and was given a physical inspection, was found to be fully qualified for service, but refused to step forward at the induction ceremony. Thereupon, the subject was referred to the United States Attorney for prosecution. The latter, on learning that additional material had been added to the file subsequent to the Board's last review on August 9th, suggested that the Board again review appellant's complete file to determine if he had undergone a change in status resulting from circumstances beyond his control. Again, the Board failed to make such a finding. Pursuant to the original induction order, a new reporting date was fixed in order to give appellant another chance to submit to induction, and on January 25, 1967 the indicated date, appellant again reported as directed. On the arrival at the induction station, he announced that

2. Exempt from both combatant and non-training and service.

3. 32 C.F.R. § 1625.2.

he was going to refuse induction. He was forthwith taken to the ceremony room and again refused to step forward and thus signified his intention to refuse induction into the Armed Services.

Here, we do not necessarily reach the "crystallization" theory decided against appellant's contentions in *Ehlert* v *United States*, No. 21930, ... F.2d ..... (9th Cir., Nov., 1969). On the record before us, appellant's conscientious scruples were formulated at the time he filed his Form 150, specifically requesting 1-A-O status. This necessarily follows from the statement in his letter, filed after the notice to report, where he claimed that he would have asked for a 1-O classification in his original application if he had had proper counsel and advice and had understood the "existent classifications". This letter does not show a change in, or crystallization of, appellant's views or opinions after receipt of the notice of induction. Consequently, the record here is within the purview of *Dugdale* v. *United States*, 389 F.2d 482 (9th Cir. 1968); *United States* v. *Kanner*, ... F.2d ....., No. 23391 (September 25, 1969, Ninth Circuit); *United States* v. *Cralle*, ... F.2d ....., No. 23400 (August 14, 1969, Ninth Circuit), and similar cases. Assuming, however, that the record supported appellant's claims of a crystallization of his conscientious objections subsequent to his notice to report for induction, our decision, nevertheless, would be controlled by *Ehlert* v. *United States*, *supra*. The lower court correctly decided this issue.

Appellant claims that the failure of the personnel at the Induction Center to afford him a *second* physical inspection requires a reversal. He says that *Briggs* v. *United States*, 397 F.2d 370 (9th Cir. 1968), requires such a result. We disagree. In *Briggs*, there was no physical inspection as required by Army Regulation 601-270, ch. 3, §III, par.

69, at 3-23 (1965).[4] Here, the appellant underwent and passed the required physical inspection within 180 days prior to his induction processing, but the processing was interrupted while his file was referred back to the Local Board by the United States Attorney in order that the Board might consider material that had been added to the file subsequent to the Board review of August 9th. After this review, a new reporting date was established for what can well be described as a continuation of the original induction procedure. No request was made by appellant for a supplemental physical inspection. To the contrary, he reported as directed, and forthwith announced that he was refusing induction. Immediately thereafter, he refused to take the necessary forward step. On this record, appellant was not entitled to a supplemental physical inspection. We decline to extend *Briggs* to cover a factual situation such as here presented.

Appellant's claim of a denial of due process is completely without substance.

AFFIRMED.

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4. "Registrants or applicants for induction or enlistment, who have undergone a medical examination of the prescribed scope within 180 days prior to the induction processing and have been found medically qualified, will undergo a physical inspection."

APPENDIX B

Judgment

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROBERT LAWRENCE DILLON,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

No. 24440

APPEAL from the United States District Court for the Northern District of California

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered March 13, 1970.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Wednesday, April 13th, 1970
Before: MADDEN, KOELSCH & KILKENNY, Circuit Judges

Order Denying Petition for Rehearing

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of Appellant

filed March 26, 1970 and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

APPENDIX D

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V

CRIMINAL PROCEEDINGS AND CONDEMNATION OF PROPERTY

[SECTION 1.] No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Proposed September 25, 1789; ratified December 15, 1791.

Congress declared in Section 456 (j) of the Universal Military Training and Service Act, 50 U.S.C. App., that:

> "Nothing contained in this Title shall be construed to require any person to be subject to combatant train-

ing and service in the armed forces of the United States, who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."

Congress declared in Section 1 of the Act: "Policy and intent of Congress:

"(c) The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."

Section 1625.2 of the Selective Regulations (32 C.F.R. §1625.2 (E. O. 10292, 16 F. R. 9862, Sept. 28, 1951)) provides:

"*When registrant's classification may be reopened and considered anew.*—The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; *provided*, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252), unless

the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

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32 C.F.R. § 1628.10:

"1628.10 Who Will Be Examined.—Every registrant, before he is ordered to report for induction, or ordered to perform civilian work contributing to the maintenance of the national health, safety, or interest, shall be given an armed forces physical examination under the provisions of this part, except that a registrant who is a delinquent and a registrant who has volunteered for induction may be ordered to report for induction without being given an armed forces physical examination."

Army Regulation 601-270, Ch. 3, § III, para. 69 at 3-23 (1965) states:

"Registrants or applicants for induction or enlistment, who have undergone a medical examination of the prescribed scope within 180 days prior to the induction proc sing and have been found medically qualified, wil undergo a physical inspection."

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1547

ROBERT LAWRENCE DILLON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

After a jury-waived trial in the United States District Court for the Northern District of California, petitioner was convicted of having wilfully disobeyed the order of his local Selective Service board to submit to induction, in violation of 50 U.S.C. App. 462. Petitioner was sentenced to 18 months' imprisonment and fined $2,500. Execution of sentence was suspended on the condition that petitioner obtain work of national importance. The court of appeals affirmed (Pet. App. A).

Petitioner contends that the issue in the instant case is identical to that in a case presently pending before this Court, *Ehlert* v. *United States,* No. 1383,

387-515—70

certiorari granted, May 4, 1970—*i.e.,* whether the alleged maturation of conscientious objector beliefs is, within the language of 32 C.F.R. 1625.2, a circumstance "over which the registrant had no control." However, the record at trial, which is recounted in some detail in the opinion below, casts doubt on the notion that petitioner underwent a crystallization of his objector views only after receipt of an induction notice.

In April 1966, approximately one month after passing a pre-induction physical examination, petitioner submitted an SSS Form 150, the form for conscientious objectors, in which he indicated that his objection was to combatant service (S.S. 45).[1] After a personal interview he was classified I–A–0, eligible for non-combatant service.[2] After receiving a notice of induction, petitioner wrote to the board seeking reclassification from I–A–0 to I–0, exempt from both combatant and non-combatant training and service in the Armed Forces. Petitioner stated that during the past few months he had developed and refined his ideas concerning conscientious objection, and that following his interview, he realized that he had deceived himself into thinking he could serve in a non-combatant status.

[1] "S.S." refers to petitioner's Selective Service file, a copy of which is being lodged in this Court.

[2] A report of the interview indicates that the petitioner stated that he did not object to non-combatant duty, that he would like to do something not directly involved in the war effort, like working in a hospital (S.S. 51).

He claimed he would have applied for I–O classification originally if it were not for his "ignorance of the existent classifications, and [his] total lack of advice and counsel at that time" (S.S. 53). The board reviewed the petitioner's file and determined the facts did not warrant reopening or reclassification of his case (S.S. 55).

Petitioner thereafter refused to step forward for induction. After a second review of petitioner's file,[3] the board again ordered him to report for induction (Pet. App. A2). At the induction center petitioner informed the first man he talked to that he was refusing induction (Tr. 31). He was not given a second physical inspection.[4] Again, petitioner refused to take the ceremonial step forward for induction.

As the court below indicated, it found it unnecessary, on the instant record, to reach the crystallization theory involved in *Ehlert* v. *United States*, 422 F. 2d 332 (C.A. 9) (Pet. App. A3). Petitioner's representations to the board arguably negate any con-

[3] Petitioner, after the August 2, 1966 letter, addressed other letters to Selective Service officials requesting reclassification (S.S. 57, 66). Various citizen letters were likewise submitted on his behalf concerning petitioner's sincerity (S.S. 61, 62–63).

[4] Petitioner received a pre-induction physical on March 18, 1966. He received a physical inspection on the first reporting date for induction, August 17, 1966. The second reporting date, based as it was upon the original order, was, as the court below noted, no more than a continuation of the original induction procedure.

tention that his objection to non-combatant service matured after the order to report for induction.[5] Nonetheless, the court below went on to state that, "[a]ssuming * * * that the record supported [petitioner's] claims of a crystallization of his conscientious objections subsequent to his notice to report for induction, [its] decision * * * would be controlled by *Ehlert* v. *United States, supra*" (Pet. App. A3). In these circumstances, we recognize that, despite the factual differences, the Court might wish to defer action on the present petition until after it has decided the *Ehlert* case.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1970.

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[5] Petitioner also claims a denial of due process in that the Board took no notice of notification that the petitioner was a student (Pet. 15). But no claim is made that petitioner was entitled to a student deferment at the time of his induction or that he, himself, requested a second such exemption (S.S. 88–89A; Tr. 10, 54, 56).

U.S. GOVERNMENT PRINTING OFFICE: 1970